MULTISTATE TAX COMMISSION

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To:	Sales and Use Tax Subcommittee
From:	Roxanne Bland, MTC Counsel
Date:	July 14, 2011
Subject:	Model Statute on Associate Style Nexus

At its March, 2010 meeting, the Subcommittee initiated two projects related to sales and use tax education and enforcement: (1) a sales and use tax notice and reporting model, and (2) an associate nexus model. The Subcommittee determined it would work first on the sales and use tax notice and reporting model; and in March 2011 when that work was completed, the Subcommittee   directed that work begin on an "associate nexus" model statute. The purpose of this memorandum is to provide background and present a list the policy choices the subcommittee might wish to consider in moving forward with this associate nexus project.

Background

Several states have enacted[1] or introduced[2] legislation requiring an Internet retailer to collect sales or use tax on purchases sourced to their state if the retailer contracts with a resident

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[1] AR: http://www.arkleg.state.ar.us/assembly/2011/2011R/Bills/SB738.pdf
CA: http://services.taxanalysts.com/taxbase/eps_pdf2011.nsf/DocNoLookup/14666/$FILE/2011-14666-1.pdf
CT: http://www.cga.ct.gov/2011/TOB/S/2011SB-01239-R00-SB.htm
IL: http://www.ilga.gov/legislation/publicacts/96/PDF/096-1544.pdf
NY:
http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$TAX1101$$@TXTAX01101+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=55091988+&TARGET=VIEW
NC: http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=105-164.8
RI: http://www.rilin.state.ri.us/Statutes/TITLE44/44-18/44-18-15.HTM
http://www.rilin.state.ri.us/Statutes/TITLE44/44-18/44-18-15.HTM
VT:
http://services.taxanalysts.com/taxbase/stn3.nsf/dockey/3851DCA890DECC32852578A500054486?OpenDocument&highlight=0,vermont

[2] AZ: http://www.azleg.gov/legtext/50leg/1r/bills/hb2551p.pdf
MA: http://www.malegislature.gov/Bills/BillText/12040?generalCourtId=1

to pay a commission for purchases made through the resident's internet website and if those purchases exceed some threshold amount.

New York was the first state to enact such a law in 2008. N.Y.S. §1101(8)(vi). The law provides that a seller making taxable sales of tangible personal property into the state

a) is presumed to be soliciting sales of through a representative or independent contractor if:

1) the seller enters into an agreement with a resident under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise to the seller, and

2) the cumulative gross receipts of the seller from sales to customers in the state who are referred to it by all residents with this type of agreement is in excess of $10,000 per year;

b) the presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation on behalf of the seller.

Of the several other states that have followed suit, all have enacted or proposed legislation that reference an agreement with a resident for a commission or other consideration for referring potential customers to the seller through a link on the resident's internet website, and, with the exception of one state, a rebuttable presumption that the seller is obligated to collect sales tax if sales into the state exceed a certain gross amount in a given year. Regarding the latter, though most states set the threshold at $10,000, other states have set the bar as low as $2,000.[3] One state has limited the law's application to retailers with sales in the state in excess of $500,000 in the preceding year.[4] One state requires at least 15 states to have adopted a similar law before its law becomes effective.[5]

The legislation has been challenged by Amazon.com in New York.[6] In that state, Amazon.com asserts that the law violates the Commerce Clause because it applies to an out-of-state retailer without substantial nexus to the state. Second, it asserts that the statute violates the Due Process Clause, because practically speaking, it creates an irrebuttable presumption that it has engaged in "solicitation" within the state. And third, the lawsuit contends that the statute violates the Equal Protection Clause because it is intentionally targeted at Amazon. The New York Supreme Court (trial court) granted the Department's motion for summary judgment against Amazon.com and Overstock.com, rejecting Amazon's and Overstock's Commerce Clause, Due Process and Equal Protection claims that the statute is facially unconstitutional and is unconstitutional as applied. The New York Supreme Court, Appellate Division upheld the decision of the trial court on the facial claims, but remanded on the "as applied" Commerce

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MN: https://www.revisor.mn.gov/bin/bldbill.php?bill=S0458.0.html&session=ls87
MS: : http://billstatus.ls.state.ms.us/documents/2011/pdf/HB/0300-0399/HB0363IN.pdf
NM: ftp://www.nmlegis.gov/bills/house/HB0102.html
TN: http://www.capitol.tn.gov/Bills/107/Bill/HB1912.pdf
TX: http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB01317I.pdf#navpanes=0
[3] CT - $2,000; TN - $4,800; RI - $5,000.
[4] CA
[5] VT
[6] N.Y.R. 81 AD 3d 183 (2010), http://www.nycourts.gov/reporter/3dseries/2010/2010_07823.htm

Clause claims to the trial court. Amazon.com has appealed, asking the Appellate Division to resolve the "as applied" claims or to allow the case to proceed to the New York Court of Appeals (December 6, 2010).

No further action has been taken to date. In addition, no litigation has been initiated in any other state with a New York-style associate nexus law.

Policy Choices

Below are four policy choices that the subcommittee might wish to consider:

1. Should a model be developed now, before litigation is final in New York?
2. Should the statute take the form of a presumption that, assuming all requirements are met, the seller is obligated to collect sales and use tax?
3. What gross receipts threshold should trigger the obligation to collect?
4. Should the presumption be rebuttable?